

REMARKS

In response to the Office Action containing a Restriction Requirement dated June 23, 2009, Applicant herein responds as follows.

The Office Action sets forth a restriction requirement to one of the following Species:

First Species: Figures 2-3 and

Second Species: Figures 4-5.

Applicant contacted Examiner Jerabek on July 23, 2009 and clarified page 2 of the Office Action. Per the Examiner, the reference to Claims 1 and 14-15 at the bottom of page 2 should recite that Claims 1 and 14-15 are generic claims.

The MPEP in §803 makes clear that a restriction between patentably distinct inventions is only proper if the inventions are independent or distinct as claimed and there is a serious burden on the examiner if a restriction is not required. A serious burden on the examiner is prima facie shown if the examiner shows by appropriate explanation of separate classification, or separate status in the art, or a different field of search (see, further MPEP §808.02). However, where "the classification is the same and the field of search is the same and there is no clear indication of separate future classification and field of search, no reasons exist for dividing among related inventions." Yet, the Office Action has done no more than to state that the species have "mutually exclusive characteristics" and are separate and distinct without any suitable explanation or support for this distinction. All claims, except claims 14 and 15 depend ultimately from claim 1 and have overlapping subject matter. (See also page 10 lines 4 – 8 of the Specification). In addition, the two species disclosed in figures 2-3 and 4-5 may be used together in a hybrid case. (See claim 13 and pages 2-3 and 10-11 of the specification).

It is further respectfully submitted that Claims 1, 4, 6 and 10-15 of the application were previously examined on the merits at least 9 times over the last 5 years with the same Examiner without an indication of undue burden on the Patent Office. These claims have now been restricted to two species. Applicant does not believe there is any burden placed on the examining corps to continue to examine all of the claims of the application as one group. While additional dependent claims were added, previously examined claims 1, 4, 6 and 10-15 remain pending. There has been no showing of undue burden other than a conclusory statement that the species require a different field of search and allegations that prior art would “not likely” be applicable to both species and the species “are likely” to raise different non-prior art issues. (See Page 3 of March 23, 2009 Office Action). Accordingly, it is respectfully requested that the Patent Office Reconsider and withdraw the Restriction Requirement and that all of the pending claims be examined on the merits.

In the event that the Patent Office maintains this restriction requirement, Applicant respectfully requests that it be restated in a non-final form with proper support for the requirement so that Applicants may address that support in a subsequent response.

Election

If the Examiner decides to maintain this restriction, Applicant hereby elects, with traverse, the invention of the Second Species corresponding to Figures 4-5 and relating to image-based tracking operations for prosecution on the merits if no generic claim is finally held allowable. Applicant’s election covers the invention relating to the Second Species and corresponds to generic Claims 1, and 14-15 and Claims 4, 6, 12, 16-24 and 28-30.

Applicant specifically reserves the right under 35 U.S.C. §121 to prosecute the non-elected subject matter by way of a separate divisional application.

Conclusion

Applicant respectfully requests that all claims in the application be examined together on the merits as one application and further requests reconsideration and withdrawal of the Restriction Requirement. In view of the foregoing, early and favorable consideration of all claims of the application is respectfully requested.

If the Examiner should have any questions concerning this communication or feels that an interview would be helpful, the Examiner is requested to contact the undersigned.

Respectfully submitted,

Kevin C. Ecker, Esq.
Registration No. 43,600

Date: July 23, 2009

By: /kevin c. ecker/
Attorney for Applicants

Mail all correspondence to:
Kevin C. Ecker, Esq.
Senior IP Counsel
Philips Electronics North America Corp.
P.O. Box 3001
Briarcliff Manor, New York 10510-8001
Phone: (914) 333-9618